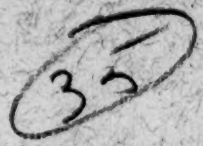

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 357

THE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT FOR THE THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT FOR THE THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Industrial Board of the State of New York respectfully shows and alleges:

First: That your petitioner is a Board duly appointed and organized under the Laws of the State of New York to administer the Workmen's Compensation Law, known as and by Chapter 816 of the Laws of 1913 as re-enacted by Chapter 41 of the Laws of 1914 and the acts amendatory and supplemental thereto. That under the said Workmen's

Compensation Law, said Board, your petitioner herein, determines all questions within its jurisdiction unless reversed or modified on appeal. That appeals may be taken from awards or decisions of said Industrial Board to the Appellate Division of the Supreme Court, Third Judicial Department, of the State of New York. Section 23 of said Compensation Law provides that the Industrial Board shall be deemed a party to every such appeal and that the Attorney General shall represent said Board. It is also therein further provided that appeals may be taken to the Court of Appeals from the decisions and orders of the Appellate Division.

Second: This proceeding was brought under the Workmen's Compensation Law of the State of New York by Ernest Wright to secure compensation for serious permanent facial disfigurement, which resulted from accidental injuries sustained by him while employed by the New York Central Railroad Company. At the time of said accidental injury, the employer railroad was engaged in the operation of a railroad within the State of New York and extending to contiguous states and a foreign country, Canada.

The issue in this proceeding is whether the New York State Workmen's Compensation Law applies to the case or whether the sole remedy is provided by the Federal Employers' Liability Act (U. S. C. A. Title 45, Chapter 2).

Third: The facts in this case are as follows:

Ernest Wright, the claimant, was employed as a boilermaker by the New York Central Railroad Company (R. 16, 17, 23, 24, 31). He worked at the employer's Rensselaer engine house (R. 17, 23, 31). His hours of work were from 4 P. M. to 12 M (R. 34). His work consisted of all kinds of general repairs in the line of boiler work (R. 34).

All types of engines—passenger, freight and switch—came to the Rensselaer engine house for various classes

of repair and maintenance work (R. 34-35, 36). However, the claimant's work on the engines was "only as far as boiler work was concerned" (R. 36). The claimant testified that he was familiar with running repairs only as relating to boiler work, and nothing else (R. 36). He testified that most of his work was heavy repair work, done on engines withdrawn from service for two or three weeks at a time (R. 38, 39). He further stated (R. 39) that even if he worked on several engines during one day, these engines were definitely out of service, in fact, "*They would have to be dead engines to work on them*" (R. 39).

The claimant pointed out that the "hot gang" took care of incoming engines, or "live" engines (R. 39). He definitely stated that this was not his job (R. 39), so it is clearly apparent that he worked exclusively on engines which had been withdrawn from service.

The claimant was engaged in the foregoing work on five days of the week. It is not disputed that on the sixth day of each week, when the boiler inspector had his day off, the claimant acted in his stead, receiving 5 cents an hour extra therefor (R. 33, 34, 37, 39, 61). This he had been doing for five years (R. 34). It is also undisputed that the duties of boiler inspector, performed by the claimant on November 6th, 11th, 15th, and 20th in 1939, were in interstate transportation (R. 61-68).

On November 22, 1939, at about 9 P. M., the claimant was using an oxy-acetylene torch to burn rivets off a boiler. A spark from the torch was projected into a carbide can several feet away, and the resultant explosion blew the cover off the can. The cover hit the claimant in the face and the fumes from the can burned him on the face and neck (R. 16, 17, 30, 31).

The engine upon which the claimant was working at the time of the injury was a "dead" engine, one whose fires had been dumped after its withdrawal from service (R.

31, 32, 70). The engine tank was being patched and the water had to be emptied out before the job could be done (R. 31).

The engine was No. 5327, a passenger engine which had drawn train No. 43 from Harmon to Albany on the morning of November 22, 1939. The engine tank was leaking when the train arrived at Albany, so the engine was taken off the train and a relief engine was substituted to continue the trip to Buffalo and Suspension Bridge (R. 46-47, 48, 52). The testimony of the conductor of train No. 43 establishes that the train was in interstate transportation (R. 51-53).

Train No. 43 arrived in Albany at about 5:30 A. M. on November 22nd, and within three-quarters of an hour thereafter the engine was taken off the train and brought to the Rensselaer engine house. Then the fires were immediately dumped and the water drawn, the engine being ready for repairs before 8 A. M. (R. 50). The material for the repairs could not be secured from the West Albany shop until after 8 A. M. (R. 50). Between 8 A. M. and 4 P. M. the day gang cut out the leaking section of the engine tank, secured the new material from the shop, fitted it, and had it practically ready for welding at 4 P. M., when the claimant came on duty (R. 32, 40).

The claimant's accident occurred at 9 P. M. (R. 17) or 9:30 P. M. (R. 32), at which time there was work yet to be performed on the engine, such as driving rivets, chipping off weld, and grinding (R. 32). The claimant remained at the engine house until midnight, at which time the men were still working on the engine (R. 32).

Between midnight and 1 A. M. on November 23rd the work was finished and the engine was fired (R. 48, 49). At 1 A. M. the assistant terminal foreman (R. 45) assigned the engine to relief work (R. 47, 48, 49, 50). Several hours later the engine was sent to draw train No. 82. This train, due in Albany at 4:20 A. M., arrived late and blew for a

relief engine to continue its trip to Harmon (R. 47, 48, 49). The testimony of the conductor of train No. 82 establishes that the train was in interstate transportation (R. 54, 55).

It clearly appears in the record that prior to this assignment to interstate transportation, which assignment occurred at about 4:30 A. M. on November 23rd, engine No. 5327 had no assignment whatsoever (R. 50, 51). This was due to the fact that on a job of this kind the time of completion could not be definitely predicted (R. 33, 50-51). It also clearly appears in the record that engine No. 5327, the "dead" engine, was the only one on which the claimant worked during the day of his accident (R. 38, 40, 70).

Fourth: Upon the foregoing facts the Industrial Board found that at the time of the accident the claimant was not engaged in interstate commerce (R. 13-16), and awarded compensation for facial disfigurement in accordance with the terms of the New York State Workmen's Compensation Law (R. 12, 15). The Industrial Board thereby ruled against the contention of the employer railroad, which contention was that the claimant was subject to the Federal Employers' Liability Act, as amended on August 11, 1939, and was not subject to the provisions of the State Workmen's Compensation Law (R. 75).

Fifth: On appeal by the employer railroad to the Appellate Division of the Supreme Court, Third Judicial Department, the award made by the Industrial Board was reversed and the claim was dismissed. The decision for reversal was by a three to two vote (R. 81). A majority opinion was written by Bliss, J., in which Hill, P. J., and Crapser, J., concurred (R. 81, 82). A minority opinion was written by Heffernan, J., in which Foster, J., concurred (R. 83-93). The Industrial Board appealed to the Court of Appeals from the order of the Appellate Division. The Court of Appeals affirmed the order of the Appellate Division. No opinion was written and all judges concurred.

Sixth: The sole issue in this case is whether or not the claimant is subject to the Federal Employers' Liability Act, particularly Section 51 thereof, as amended on August 11, 1939. This has been the sole issue since the hearings began (R. 21, 27, 30, 55). The Industrial Board held that the claimant was not engaged in interstate commerce at the time of his injury and that the State Workmen's Compensation Law governed the claim. The self-insured employer railroad appealed to the Appellate Division of the Supreme Court, Third Judicial Department, contending that the claimant, because of the 1939 amendment to Section 51 of the Federal Act, came within the scope thereof and had no remedy under the State Workmen's Compensation Law.

The Appellate Division ruled that by the 1939 amendment to the Federal statute "the scope of the statute was so broadened as to include practically all employees of interstate carriers * * *." and that "The Act is now all inclusive and made so purposely." Thus the Industrial Board's position, that Congress, in amending the statute, did not intend to affect employees of the claimant's class, was held to be incorrect. The bases of the Industrial Board's position are dealt with in more detail in the brief annexed to this petition.

The minority opinion subscribed to the Industrial Board's contention that the scope of the amendment was limited and did not include the claimant. The minority opinion also maintained that the statute, if applicable to the claimant, is unconstitutional in that it interferes with the inherent and reserved right of the state to regulate its own local, domestic and internal commerce.

The aforesaid issue of statutory construction and interpretation, and the issue of constitutionality under the Federal Constitution were argued in the Court of Appeals of

the State of New York and were resolved against the Industrial Board without opinion.

Seventh. The Court of Appeals erred in deciding that the claimant had no remedy under the Workmen's Compensation Law and in relegating the claimant to his remedy under the Federal Employers' Liability Act, which demands that the claimant prove negligence on the employer's part before he can establish his claim. The decision of the Court of Appeals is completely at a variance with the intent of Congress in passing the 1939 amendment. The intent of Congress, as evidenced by the Senate Judiciary Committee Report and the minutes of the hearings held by said Committee, manifestly was to exclude employees of the claimant's class from the scope of the amendment and to leave undisturbed the availability of State compensation laws to such employees.

It appears that the 1939 amendment to Section 51 of the Federal Employers' Liability Act has not been the subject of review by the United States Supreme Court. For the further guidance of your petitioner in making compensation awards to employees of interstate railroads, said employees being thousands in number, and for the purpose of authoritatively determining the points of law herein involved, a review of the present case by this Court is necessary. The necessity is accentuated by the fact that injuries to railroad employees will undoubtedly increase, due to the capacity volume of railroad traffic incidental to our country's war program.

Eighth: This petition, as the foregoing premises indicate, presents substantial Federal questions, to wit: 1. What employees did Congress intend to include within the scope of the Federal Employers' Liability Act by its amendment to Section 51 of said Act? 2. If Congress intended by the amended statute to include practically all employees of

interstate carriers, whether or not the employees engaged in interstate activity, thereby taking their personal injury claims entirely out of the State Industrial Board's jurisdiction, is the statute constitutional?

Your petitioner argued these questions in the appellate courts of the State of New York. The Court of Appeals of the State of New York is the highest Court of said State in which could be had a decision of the contentions raised by your petitioner. Said Court of Appeals overruled said contentions, and by its order, made on the 18th day of June, 1942, and filed in the Appellate Division of the Supreme Court, Third Judicial Department, on the 25th day of June, 1942, affirmed the order of the Appellate Division entered March 12, 1942, reversing the Industrial Board's award and dismissing the claim. The Court of Appeals sent down its remittitur, dated June 18, 1942, consisting of a copy of said order of the Court of Appeals and the papers upon which said Court made its order, and said remittitur was filed on the 25th day of June, 1942 in the office of the Clerk of the Appellate Division of the Supreme Court, Third Judicial Department, where said remittitur now remains of record. Upon said remittitur a final order, of which your petitioner seeks examination and reversal by this Court, was entered on June 25, 1942 in the office of said Clerk, whereby the said order of the Court of Appeals became the order of the Appellate Division and whereby the costs of said appeal to the Court of Appeals were awarded against the petitioner herein.

The final order entered on the 25th day of June, 1942, as aforesaid, whereby the said order and judgment of the Court of Appeals became the final order of said Appellate Division, was made pursuant to a decision which was in favor of a right, privilege or immunity set up by the respondent, to wit: that the respondent was not liable for compensation for the claimant's facial disfigurement for the

reason that at all times he came within the scope of the Federal Employers' Liability Act, as amended on August 11, 1939, and was not entitled to compensation under the statutes of the State of New York. Further, the said decision passed upon a question concerning the constitutionality of a statute of the United States.

WHEREFORE, your petitioner prays that a writ of certiorari be allowed and issued, directed to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to certify and send to this Court a full and complete transcript of the records or proceedings of said Court in this case to the end that said case may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief in the premises as to the Court may seem just and that the said judgment of the Court of Appeals, if errors be found therein, be corrected in conformity with law.

INDUSTRIAL BOARD OF THE STATE OF
NEW YORK,
By RICHARD J. CULLEN,
Chairman.

STATE OF NEW YORK,
County of New York, ss.:

Richard J. Cullen, being duly sworn, deposes and says: That he is Chairman of the Industrial Board of the State of New York; that he has read the foregoing petition and knows the contents thereof; that same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

RICHARD J. CULLEN.

Sworn to before me this 5th day of Aug., 1942.

DAVID KETT,
Notary Public.

I hereby certify that I have examined the foregoing petition; that in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by the Supreme Court.

JOSEPH A. McLAUGHLIN,
Assistant Attorney General,
Of Counsel, for the Industrial Board of the State of New York.

BRIEF FOR THE INDUSTRIAL BOARD OF THE STATE OF NEW YORK IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI.

This is an application by the Industrial Board of the State of New York to review by writ of certiorari a decision of the Court of Appeals of the State of New York in the above entitled proceeding, which affirmed an order of the Appellate Division of the Supreme Court, Third Judicial Department, reversing an award for compensation under the Workmen's Compensation Law of the State of New York and dismissing the claim.

The dismissal of the claim by the Appellate Division of the Supreme Court was on the ground that the claimant was included within the scope of the Federal Employers' Liability Act, as amended on August 11, 1939, by virtue of which amendment the State Industrial Board had no jurisdiction of the claim.

Opinions Below.

The decision and majority and minority opinions of the Supreme Court, Appellate Division, Third Judicial Department (R. 81-93) are reported in Vol. 263 App. Div. at page 461.

The Court of Appeals rendered no opinion but the memorandum decision of that Court is recorded in Vol. 288 N. Y. Reports 243 (Mem.). The decision of the Court of Appeals was rendered on June 18, 1942. The record was remitted to the Supreme Court, Appellate Division, Third Judicial Department, and upon this remittitur an order of the latter court, adopting as its own the order and judgment of the Court of Appeals, was entered on June 25, 1942.

Jurisdiction.

Jurisdiction is conferred upon this Court to review the order, judgment and decision of the Appellate Division, entered on the remittitur of the Court of Appeals, by Section 344b of U. S. C. A., Title 28. This statute reads (in part) as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

Examining the instant case in the light of the above-quoted jurisdictional requirements, it appears that said requirements are fully answered and that this application is proper. The judgment and order of the Supreme Court, Appellate Division, Third Judicial Department, is a final judgment and order rendered by the highest Court of the State of New York in which a decision in a Workmen's Compensation Law case could be had.

Salomon v. *State Tax Commission of New York*, 278 U. S. 484;

Meyers v. *International Trust Co.*, 273 U. S. 380.

At the trial of this claim and upon the appeals there was drawn in question the validity and applicability of a statute of the United States, to wit: Section 51 of the Federal Employers' Liability Act (U. S. C. A., Title 45).

Furthermore, a right, privilege and immunity was specially set up by the respondent employer railroad under a statute of the United States. The said right, privilege and immunity so claimed consisted in the contention that the respondent was not liable for compensation to the claimant for the reason that his claim was governed by the Federal Employers' Liability Act and that claimant was therefore not entitled to compensation under the statutes of the State of New York. In the Court of Appeals and in the Appellate Division your petitioner contended that said Federal statute was not applicable and that the Workmen's Compensation Law applied.

The record and briefs conclusively establish that this Federal question was presented for decision in the State courts and that the decision of the Federal question was necessary to the determination of the cause. This necessity is self-evident, for the Federal question constituted the sole issue in both appeals. The following authorities establish the authority of this Court to review Federal questions similar to that herein.

Murray v. *Joe Gerrick & Company*, 291 U. S. 315;
California v. *Deseret Water, Oil & Irrigation Co.*, 243 U. S. 415;
Atchison, T. & S. F. R. Co. v. *Robinson*, 233 U. S. 173;
Seaboard A. L. R. Co. v. *Horton*, 233 U. S. 492;
Toledo, St. L. & W. R. Co. v. *Slavin*, 236 U. S. 454.

Statement of the Case.

The Court is respectfully referred to the factual statement contained in the *Third* paragraph of the petition, and to the analysis of the dispositions of the case below, which

analysis is contained in the 4th, 5th and 6th paragraphs of the petition.

Specification of Errors.

The Court of Appeals erred:

1. In affirming the Appellate Division holding that the 1939 amendment to the Federal Employers' Liability Act made said act practically all inclusive of employees of interstate carriers and particularly of the claimant herein, thus foreclosing the Industrial Board of jurisdiction herein.

2. In overruling the Industrial Board's contention that the amended statute, as interpreted by the Appellate Division, violates the Constitution of the United States.

Summary of Argument.

The claim would not have come under the Federal Employers' Liability Act if it had arisen prior to the 1939 amendment to Section 51 of said Act. This amendment was passed to affect the rights of employees of interstate carriers whose duties require them to shift constantly in the course of their duties from interstate commerce to intrastate commerce and vice versa; i.e., employees engaged directly in train movements. The claimant was not such an employee and, therefore, is not subject to legislation designed to affect such employees.

The legislation in question was not passed for the purpose of drawing a new line of distinction or separation between interstate and intrastate commerce by railroad, its sole purpose being to bring a certain class of employees, those who entered both kinds of commerce in the course of their usual duties, within the Federal Act.

The statute, if intended to affect employees who do not enter into interstate commerce in the course of their usual duties, encroaches on the reserved powers of the states and is in violation of the Federal Constitution.

POINT I.

The claimant does not come within the provisions of the Federal Employers' Liability Act, as amended on August 11, 1939, and the State Industrial Board has jurisdiction of his claim pursuant to the provisions of the New York State Workmen's Compensation Law.

Prior to the amendment of August 11, 1939, Section 51 of the Federal Employers' Liability Act read (in part) as follows:

> "*Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.* Every common carrier by railroad while engaging in commerce between any of the several States * * *, shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce.* * * *." (Italics ours.)

The meaning of the italicized words was the subject of extensive litigation, but finally there was established a standard for determining whether an employee was "*in such commerce*" or out of same. The standard, as expressed in *Shanks* v. *D. L. & W. R. R. Co.*, 163 A. D. 565, aff'd 214 N. Y. 413, aff'd 239 U. S. 556, was as follows:

> "Was the employee *at the time of the injury* engaged in interstate transportation or in work so closely related to it as to be a part of it?" (Italics ours.)

Accordingly, for many years, the issue of whether a railroad employee's claim came under the Federal Act or under a state compensation law was determined by examining the nature of his work *at the particular time when the accident occurred.*

In 1939, however, Congress amended Section 51 of the Federal Employers' Liability Act in such a manner that

the rule of the *Shanks* case was changed. The case at bar, in which the accident occurred on November 22, 1939, must be viewed in the light of this amended statute, which reads (in part) as follows:

> "Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.* * * *.
>
> Any employee of a carrier, *any part of whose duties* as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404." (Italics ours.)

The scope of this amended statute is the sole issue herein. The petitioner contends that the amendment does not apply to "practically all employees of interstate carriers", that the act is not "now all inclusive and made so purposely", and that the amendment has no effect upon the case at bar.

Before dealing with the scope of the amended statute the petitioner will briefly demonstrate that the claimant's duties as a boilermaker, at the time of his injury *and at all times*, were purely and definitely intrastate. As noted in the petitioner's statement of facts, boiler and tank repairs could not be made unless the engine was withdrawn from service, its fires dumped and its water emptied. The "hot gang" performed these functions and then the boilermakers entered the picture to make the repairs. It is well settled that such repair work is not interstate transportation or work so closely related thereto as to be a part thereof. See the following cases:

Ind. Acc. Comm. v. *Davis*, 259 U. S. 182.
Morini v. *Erie R. R. Co.*, 253 N. Y. 539.
Leslie v. *Long Island R. R. Co.*, 248 N. Y. 511.
Zmuda v. *D. L. & W. R. R. Co.*, 268 N. Y. 659.
Conklin v. *N. Y. Central*, 206 A. D. 524, writ denied, 266 U. S. 607.

The manifest object of Congress in amending the statute was solely to eliminate the first requirement of the *Shanks* rule, that the work being done *at the time of the injury* shall determine jurisdiction. The object of Congress was to include within the Federal Act all those employees who, although injured while performing an intrastate task, usually performed interstate work in the course of their daily duties. Accordingly, Congress used the words "*any part of whose duties*", italicized by the petitioner in setting forth the amended statute above. The *Shanks* rule, restated to conform with this statutory change, would read as follows:

> "Was the employee, *irrespective of what he was doing* at the time of the injury, *one who ordinarily* engaged in interstate transportation or in work so closely related to it as to be a part of it?" (Italicized words added.)

The respondent railroad successfully contended below that the claimant herein, a boilermaker who was injured in the intrastate work of a boilermaker, which took up five full days of his working week, is one whose duties were partly in interstate commerce because he assumed another position, involving interstate activity as an inspector, on the sixth day. The respondent's position is that a literal interpretation of the words "any part of whose duties" requires the conclusion that the Federal Act applies.

The petitioner Industrial Board contends that the letter of the law is subordinate to the spirit and intention thereof,

that the words relied upon by the respondent really mean, in this case, "any part of whose duties as a boilermaker." The petitioner respectfully submits that the claimant's duties in his usual intrastate employment as a boilermaker are the determining factor, notwithstanding the claimant's substitution, on one day each week, for the boiler inspector. The petitioner will show that it was not the intent of Congress to include employees of the claimant's class within the Federal Act.

For this purpose a study is invited of certain pertinent parts of the report of the Senate Judiciary Committee, dated June 22, 1939, which furnishes excellent confirmation of the position taken by the petitioner. The specific and primary issue herein is *whether the claimant's work on one day each week as a boiler inspector of interstate engines brings him within the amended statute,* and the petitioner's argument for the negative of this proposition is based upon explicit expressions in—

The Report of the Senate Judiciary Committee.

All of this report is not here pertinent. Amendments to sections other than and foreign to Section 51 are also discussed. The opening paragraph of the pertinent part, that dealing with the amendment to Section 51, states

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers, who, *while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.*" (Italics ours.)

There is no ambiguity or uncertainty in this expression of purpose. The intent was to affect those employees who *ordinarily* engage in interstate transportation and are injured while *temporarily divorced therefrom.* The claimant

in the case at bar is clearly and definitely outside the class affected. On five of his six working days he was engaged solely in *intrastate* activity, so he could not be considered as one "ordinarily engaged in the transportation of interstate commerce."

Neither was he, at the time of the injury, "*temporarily divorced therefrom*". In the main his work was not connected with interstate transportation. He was divorced from interstate transportation, not only at the time of the injury, but on five full days in each week. "*Temporarily*" is most certainly the wrong adverb for describing this claimant's separation from interstate transportation.

In the following and concluding paragraphs the Committee plainly and unambiguously indicates the class of employees at which the amendment was directed, and that employees of the claimant's class are not within the scope of the amendment. These paragraphs follow:

> "Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be *engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.*
>
> The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, *at the very instant of his injury or death*, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.
>
> The preponderance of service performed by railroad *transportation* employees is in interstate commerce. *As to those who are constantly shifting from one class*

> *of service to another,* the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." (Italics ours.)

The claimant herein did not go from one kind of commerce to another "several times during a single tour of duty." He worked solely on intrastate work for five full days out of six. There was no need to determine what kind of movement he was engaged in "at the very instant of his injury." He was not "constantly shifting from one class of service to another." He was not a transportation employee.

The petitioner respectfully submits that the Committee report, partly set forth in the above analysis, conclusively establishes that the intent of Congress was to affect only those employees whose usual, daily and principal duties involve a constant shifting between the two kinds of commerce. Accordingly, one whose duties were never in interstate commerce would certainly remain under the State compensation law. The claimant's position and duties *as a boilermaker* fall within this category.

Certainly, it is clearly apparent that the purpose of the Federal legislation was to amend a statute, itself remedial in character, so as to do away with a narrow test which experience had proven impracticable, and to broaden its scope so as to give employees mainly engaged in work unquestionably interstate in character the benefits thereof. Yet the respondent asks for an interpretation not only foreign to the purpose of the legislation, but so harsh as to destroy the rights under State laws of those not originally covered by the Federal amendment.

The respondent's position is based upon the claimant's change to interstate duties on one day each week. Because of this, the railroad argues, he became subject to the Federal Act at all times. The logical corollary of this proposi-

tion is that if he engaged in interstate transportation on one day in the year, on one day in six months, or on one day in the month, he thereby became subject to the Federal Act. As the Committee report shows, such a result was not intended by Congress. It is submitted that the aforesaid *reductio ad absurdum* completely answers the employer's argument.

* * * * * * *

The next contention of the petitioner is addressed to the language italicized in the following quotation of the amended statute:

> "Section 51. * * *. Any employee of a carrier, any part of whose duties as such employee shall be *the furtherance of interstate or foreign commerce; or shall, in any way directly, closely and substantially affect such commerce* * * *."

It is the contention of the petitioner that by the italicized words *Congress did not mean to draw a new line of distinction or separation between local and interstate activity.* The sole purpose was to bring a certain class of employees, those who entered both kinds of commerce in their usual duties, within the Federal Act. *The minutes show a studied intent to avoid changing the dividing line between the two types of commerce.* They indicate that the use of the italicized words was meant to be merely an expression of the old standard used in drawing said line.

The Minutes of the Senate Judiciary Committee Hearings.

A Sub-committee of the Committee on the Judiciary of the United States Senate (76th Congress, 1st session) took testimony in connection with Senate Bill 1708, amending the Federal Employers' Liability Act. The hearings held on March 28th and 29th, 1939, are the hearings at which the

particular amendment involved in the instant case was discussed. Other amendments, not pertinent herein, were also discussed at these two hearings, so the Court is respectfully referred to the following pertinent pages of the printed minutes.

Pages 3- 9	Pages 64-66
Pages 26-29	Pages 73-76

The minutes above cited, which, for the purpose of brevity, will not be analyzed herein, conclusively establish the following principle. Controlled by the statutory direction that an employee's general work shall be the criterion for determining what is interstate commerce and what is not, it is still the function of the courts to draw the line between interstate and intrastate activity.

The line established in the *Shanks* case remains undisturbed—"in interstate transportation or in work so closely related to it as to be a part of it." The new language is nothing more than a re-phrasing of that part of the *Shanks* rule. The minutes, cited above, firmly establish that Congress did not seek a new standard of coverage.

* * * * * * *

On the constitutional issue, it is significant that the original Federal Employers' Liability Act, passed in 1906, was held to be unconstitutional because it contained the very provisions read into the 1939 amendment by the view of the courts below and by certain railroad and insurance carriers in this State.

Howard v. *Illinois Central R. Co.*, 207 U. S. 463.

In the *Howard* case it was held that when an act of Congress, in assuming to regulate interstate commerce, covers intrastate as well as interstate commerce, the act must fail completely. The 1906 Act embraced employees of all kinds, whether or not they were engaged in interstate com-

merce. The Act required mere employment by an interstate carrier. It was held to be void and unconstitutional because in embracing all employees it necessarily embraced those engaged in intrastate commerce. The same fatal error is apparent in the opinion of the courts below. It was said below that the amendment "includes practically all employees of interstate carriers" and that "The act is now all inclusive". On the authority of the *Howard* case, such a position cannot be sustained.

Conclusion.

The claimant in the case at bar never took part in interstate activity as a boilermaker. In this capacity he never switched from local work to work in interstate transportation. Thus he is unaffected by the 1939 statutory change. Under the law and decisions prior to the change his case comes unquestionably under state jurisdiction. So it does at present because the amendment was directed at an entirely different class of workers.

The correct interpretation of the legislation involved herein is of prime importance to thousands of railroad workers in this State. In the majority opinion below the position is taken that the Federal statute now includes "practically all employees of interstate carriers". Thus, if that position should be upheld, the burden of proving negligence in connection with personal injury claims would be cast upon these employees, many of whom are now protected by the New York State Compensation law, under which there is no such requirement.

The circumstances of this case involve a Federal question of substance and importance, and the decision of the Court of Appeals of the State of New York affirming the Appellate Division and reversing the Industrial Board is not in accord with the expressed intent of Congress in amending

the Federal statute. Therefore, the application for a Writ of Certiorari should be granted.

Respectfully submitted,

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(1857)

Supreme Court of the United States

October Term, 1942.

No. 357.

THE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OPPOSING WRIT OF CERTIORARI.

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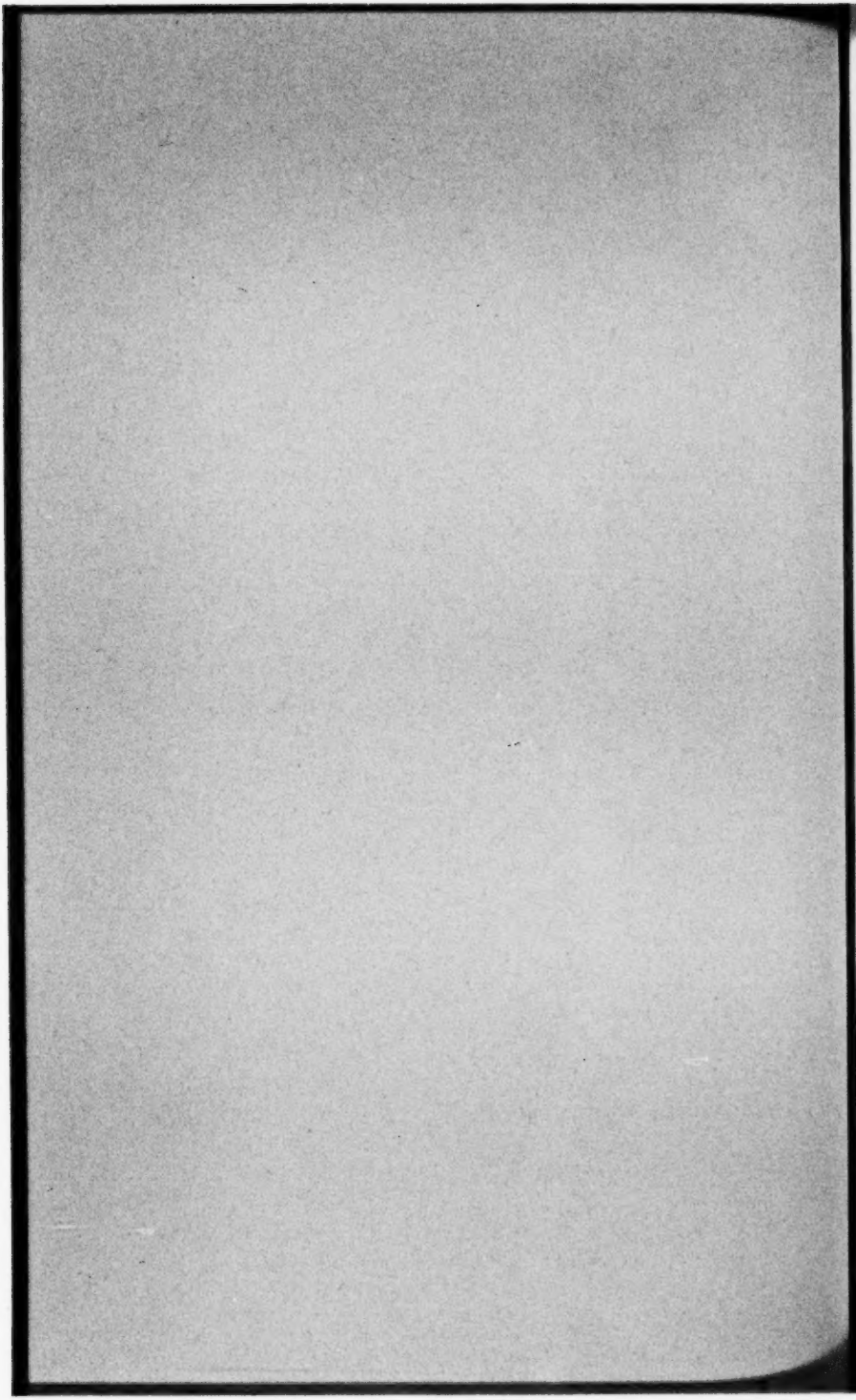

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BRIEF OPPOSING WRIT OF CERTIORARI.

STATEMENT OF FACTS.

On November 22, 1939, at about 9:30 P. M. (R. 4, 14, 17, 21, 23, 70), at the employer's engine house in Rensselaer (R. 4, 17, 31), claimant, in the course of his regular employment (R. 14, 30), which was that of a boilermaker (R. 4, 14, 16, 24, 31) and boiler inspector (R. 33, 34, 39, 61), was burning rivets off a can of carbon, with the aid of an acetylene torch, when the can exploded, with resultant burns and cuts about claimant's face, forehead and neck, causing the disfigurement for which the awards under review were made (R. 14, 17, 19-20, 26, 31, 58).

Engine No. 5327 (R. 10, 41), hauling northbound train 43 from Harmon (R. 46, 48) with cars in transit interstate (R. 53), had developed a leaking tank by the time it reached Albany, where it was cut out of the train and sent to the Rensselaer roundhouse, arriving there about

5:30 A. M. on the morning of November 22, 1939 (R. 48). Claimant, whose tour of duty was from 4 P. M. until midnight (R. 34, 38), finding Engine 5327 with its fires drawn and water drained (R. 4, 11, 15, 31, 32, 70), at once went to work upon the necessary repairs, which consisted of applying a *patch* to the leaking tank (R. 31-32, 49), and continued at work until he met with his accident at about 9:30 that evening (R. 32). After the accident, claimant went to a doctor but returned to the engine house where he stayed until his quitting hour of midnight without loss of time (R. 17, 20, 32, 44), having worked only on that engine that day (R. 38, 40, 70). At 1 A. M. on the morning of November 23, 1939, the engine, with repairs completed and its fires up, left the engine house less than twenty hours after its arrival there, under assignment to haul from Albany to Harmon (R. 47-48), train 82, which contained cars in transit from Toronto, Canada, to New York City (R. 54-55).

Working as a *boilermaker* five days a week, claimant did all kinds of general repairs in the line of boiler work on engines, including both quarterly inspections and running repairs, "first on one then on the other" (R. 34). While the greater part of claimant's time was spent on heavy work upon engines out of service for two or three weeks to undergo quarterly repairs (R. 38-39), he also made "running repairs" to any engine coming in off the road to the Rensselaer engine house for work which must be done before it went out again on another train (R. 36). Accordingly as the running repairs took from a couple of hours to eight hours, claimant might work in one day on one engine or up to half a dozen (R. 37). All through the day claimant was subject to interruption in his work on a given engine for an emergency job on another (R. 38). Whether doing heavy work or running repairs, claimant's task involved engines of all kinds—passenger, freight and switch (R. 35-38), there being at times as

many as thirty engines in and around the Rensselaer engine house (R. 42), some of which were devoted to hauling trains between Albany and Boston, Massachusetts, and others between Albany and Weehawken, New Jersey (R. 42-44).

Thus, because he was frequently called upon to make running repairs to such engines (R. 34), clearly involving duties in furtherance of or directly or closely and substantially affecting interstate transportation, his task as a boilermaker was marked by that constantly recurring transition between interstate and intrastate work which the petition (p. 3) and petitioner's brief (pp. 17, 21) stoutly maintain is essential to bring a case within the purview of the amendment (Point II, Subd. 1, p. 6, *post.*).

Working as a *boiler inspector* one day a week, as well as whenever the regular inspector was off (R. 33-34, 39, 63), claimant's task in this capacity involved, among others, Boston & Albany engines, all stipulated as operating between points in Massachusetts and points in New York (R. 66, 67). On each of the following days during the fortnight preceding his accident claimant, as a boiler inspector (R. 63), had worked on at least four engines between their arrival in Albany (R. 66) from Massachusetts and their departure a few hours later on their return trips into that state:

On Nov. 6, Engines 619, 608, 601, 606 (R. 63, 65-66).

On Nov. 11, Engines 601, 607, 615, 503 (R. 63-64, 67).

On Nov. 15, Engines 615, 602, 605, 619 (R. 64, 67).

On Nov. 19, Engines 602, 603, 615, 583 (R. 64), a date omitted from those listed on page 3 of the petition herein.

On Nov. 20, Engines 610, 615, 577, 603 (R. 64, 67).

QUESTION:

Is claimant's case covered by the Federal Employers' Liability Act?

To assert, as at pages 17 and 20 of the petitioner's brief herein, that the railroad, in classifying Wright's task as Federal, relies solely upon his employment as a boiler inspector during one day of each week is utterly to misconceive the railroad's contentions, which are:

Point I (*infra*)—Regardless of the 1939 amendment, Wright's task when he sustained his injury was Federal.

Point II (p. 6, *post.*)—The 1939 amendment serves but to emphasize the Federal color of Wright's duties.

Both contentions were asserted by the railroad before the Industrial Board (R. 9, 10, 21, 27, 55).

POINT I.

Regardless of the 1939 Amendment, Wright's task when he sustained his injury was Federal.

The petition herein correctly states (p. 2) that "The issue in this proceeding is whether the New York State Workmen's Compensation Law applies to the case or whether the sole remedy is provided by the Federal Employers' Liability Act." But the railroad does not agree with the following statements in petitioner's brief:

> "The claim would not have come under the Federal Employers' Liability Act if it had arisen prior to the 1939 amendment to Section 51 of said Act" (p. 14);
>
> "The scope of this amended statute is the sole issue herein" (p. 16);

"The specific and primary issue herein is whether the claimant's work on one day each week as a boiler inspector of interstate engines brings him within the amended statute" (p. 18);

"The respondent's position is based upon the claimant's change to interstate duties on one day each week" (p. 20).

This Court has taken pains to point out that time is a determinative factor in the classification of upkeep work as Federal or non-Federal. Discussing the circumstances of definite character of the task involved it has said (italics ours):

"Equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances, *and among the circumstances is the time taken for repairs—the duration of the withdrawal from use.* Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations."

Ind. Acc. Comm. v. Davis, 259 U. S. 182, 187.

In sharp contrast with the engine considered in a case which has been cited many times, the engine involved in the case at bar actually was "interrupted in an interstate haul to be repaired and go on" with its next haul which the petitioner concedes (p. 5) to have been within the Federal Act.

Minneapolis & St. Louis R. R. v. Winters, 242 U. S. 353, 356.

So, too, this Court has classified within the Federal Act the work of one engaged in lubricating, in a roundhouse, an engine that was last used in hauling interstate trains and had not been withdrawn from service, observing:

> "His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it * * *."
>
> *New York Central R. R. Co. v. Marcone,* 281 U. S. 345, 350.

The decision in the case last cited turned upon the fact that "the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run."

> *N. Y., N. H. & H. R. R. Co. v. Bezue,* 284 U. S. 415, 420.

POINT II.

The 1939 Amendment serves but to emphasize the Federal color of Wright's duties.

1. *Twice petitioner's brief insists that Wright's "usual duties" brought him squarely within the terms and purpose of the amendment.*

(a) "The manifest object of Congress in amending the statute was solely to eliminate the first requirement of the *Shanks* rule, that the work being done *at the time of the injury* shall determine jurisdiction" (p. 17);

(b) "The sole purpose was to bring a certain class of employees, those who entered both kinds of commerce in their usual duties, within the Federal Act" (p. 21).

Such contentions are precisely consistent with the averment in the petition (p. 3) that Wright's usual duties involved transition between interstate and intrastate tasks.

IN THE LIGHT OF THESE CONCESSIONS OF ACCORD WITH THE RAILROAD'S CONTENTION, CONCURRENCE OF BOTH PARTIES IN THE APPLICABILITY OF THE AMENDMENT TO THE CASE AT BAR IS CLEARLY ESTABLISHED.

2. *The language of the paragraph added by the amendment to §1 of the Federal Act is unambiguous and comprehensive.*

In terms which petitioner's brief (p. 22) states is nothing more than a statutory recognition of the rule announced in *Shanks v. D., L. & W. R. R. Co.* (239 U. S. 556), it reads (45 U. S. Code, §51):

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carrier by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Its language was designed to be as broad as possible in its scope, since it applies to "ANY EMPLOYEE," "ANY PART" of whose duties are in furtherance of interstate or foreign commerce; or in "ANY WAY" directly or closely and substantially affect such commerce. To reach any other conclusion, one must interpret the word "duties" as referring only to the particular duties performed by the employee when injured, which would result in nullifying the plain words of the amendment. The only alternative to such a narrow and limited interpretation is a broad and comprehensive one. The railroad contends that the amendment disregards any limitation as to the time when the employee's duties in furtherance of, or in any way directly or closely and substantially affecting, interstate commerce had been or were to be performed; nor would the importance of those duties, as compared with the sum total of all of such employee's duties, be of

the slightest significance. It is immaterial whether or not a member of a switching crew or a car repairer is engaged in work on a car then used in or designated for interstate commerce, the only requirement to bring a case within the amendment being that "ANY PART" of the employee's duties, past, present or future, be in furtherance of, or such as to affect, such commerce in any way, directly or closely and substantially. For Congress, in thus amending Section 1 of the Federal Act, has enacted that such employees "shall be considered as entitled to the benefits of this act."

> "If this mandate is to be changed, it must be changed by Congress and not by the Courts."
>
> *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 43 (April 6, 1942).

The word "any," occurring three times in the amendment, has in each instance a clear and distinct meaning.

(a) "Any employee" of the class described in the opening words of the amendment means "every employee."

The opening words of Section 5 of the Federal Employers' Liability Act itself, proscribing *"any contract"* designed to exempt a railroad from liability thereunder, have been held to embrace *every* such agreement.

> *Phila., Balt. & Wash. R. R. Co. v. Schubert,* 224 U. S. 603, 613.
>
> *Duncan v. Thompson,* 315 U. S. 1, 5-6 (Jan. 12, 1942).

The provisions of the Merchant Marine Act (46 U. S. C., §688), according to "any seaman" or to his personal representatives a right of action for his personal injury or death, have been held, contrary to the earlier rule which preceded the enactment, to include the master of a vessel.

> *Warner v. Goltra,* 293 U. S. 155, 162.

(b) "Any part of whose duties," as the term is used in the amendment, means some of whose duties; or one or more of whose duties.

Standard Oil Co. v. U. S., 221 U. S. 1, 50, 61.

(c) "In any way," as the term is used in the amendment, means in one way or another.

Stachelberg v. Stachelberg, 121 App. Div. 232, 234; aff'd on opinion below, 192 N. Y. 576.

3. *No substantial question of constitutionality is presented.*

It is too late to question the *power* of Congress to legislate for the protection of railroad workers whose tasks are essential in furtherance of transportation across state lines. This Court has observed in a case under the Federal Employers' Liability Act:

> "no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

Illinois Central R. R. v. Behrens, 233 U. S. 473, 477.

In a case under the Federal Safety Appliance Acts:

> "The scope of the legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged."

Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 39.

In a case under the Railway Labor Act:

> "At times a continuous stream of engines and cars passes through the 'back shops' for such repairs * * * The activities in which these employees are engaged have such a relation to the

other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce."

Virginian Ry. v. Federation, 300 U. S. 515, 556.

In a case under the National Labor Relations Act:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

Labor Board v. Jones & Laughlin, 301 U. S. 1, 37.

4. *Recourse to committee reports in Congress is quite unnecessary.*

Not unless the language of a statute is "doubtful or obscure" is resort had to such reports, and then only "to solve doubt and not to create it."

Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 589.

Here, however, the language is imperative, questionless and certain.

"* * * The words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."

Standard Co. v. Magrane-Houston Co., 258 U. S. 346, 356.

"Like other extrinsic aids to construction their use is 'to *solve,* but not to *create* an ambiguity'" (italics in original).

U. S. v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83.

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."
>
> *U. S. v. Hartwell,* 6 Wall. 385, 396.

Moreover, the minutes of hearings before a subcommittee of the Senate Judiciary Committee, to which petitioner refers at pages 21-22 of its brief, show that pages 3-9 and 73-76 thereof consist largely of statements made to the subcommittee by Mr. T. J. McGrath, while pages 26-29 and 64-66 thereof are made up of statements similarly made by Mr. F. M. Rivinus. Yet statements made *to* committees of Congress are without weight in the interpretation of a statute.

> *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488, 493-4.

Hence, the most which can be said for the bearing of the committee reports upon this case is "that Congress had opportunity by the reports of its committees, and otherwise" to circumscribe the application of the 1939 amendment, but obviously chose not to do so.

> *U. S. v. Southern Pacific Co.,* 259 U. S. 214, 234.

POINT III.

Certiorari should be denied.

Each of petitioner's arguments in support of the writ is untenable, since none of them presents a substantial Federal question, because:

1. The state courts properly classified Wright's task as Federal, as matter of law.

> *Phila. & Read. Ry. Co. v. Hancock,* 253 U. S. 284, 285.

2. However broad the language of the majority in the Appellate Division in giving its reasons for its decision (R. 82), petitioner is not aggrieved thereby, as it contends at page 6 of its petition and at pages 11, 14, 16 and 23 of its brief, inasmuch as that decision correctly classified Wright's task as Federal, and hence affords no ground for reversal.

3. Nor does the affirmance by the Court of Appeals without opinion (Petition, p. 7; Petitioner's brief, p. 14) signify anything beyond approval of the result in the court below, the effect being much the same as a denial of certiorari by this Court.

Rogers v. Decker, 131 N. Y. 490, 493.
People ex rel. Palmer v. Travis, 223 N. Y. 150, 156.
U. S. v. Carver, 260 U. S. 482, 490.

4. The petition (p. 7) and brief (p. 23) in effect ask this Court to pronounce a declaratory judgment defining the scope of the 1939 amendment; whereas the single question presented is whether, upon its particular facts, *this* claimant's case is governed by the Federal Act, an issue cleared by petitioner's concessions (Point II, subd. 1, p. 6, *ante*).

All of which is respectfully submitted.

Dated, September 25, 1942.

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